No. 98-436

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

JOHN ALDEN, *et al.*,
*Petitioners,*

v.

STATE OF MAINE,
*Respondent.*

**On Writ Of Certiorari To The Supreme Judicial Court Of Maine**

# BRIEF OF THE STATES OF MARYLAND, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, INDIANA, IOWA, KANSAS, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH DAKOTA, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WEST VIRGINIA, WISCONSIN, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
MICHELE J. MCDONALD
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

Counsel for *Amici* States

**Counsel of Record*

[additional counsel listed on inside cover]

33pp

BILL PRYOR
Attorney General of Alabama
11 South Union Street
Montgomery, AL 36130

JANET NAPOLITANO
Attorney General of Arizona
1275 West Washington
Phoenix, AZ 85007-2926

MARK PRYOR
Attorney General of Arkansas
323 Center Street, Suite 200
Little Rock, AR 72201

KEN SALAZAR
Attorney General of Colorado
1525 Sherman Street
Denver, CO 80203

M. JANE BRADY
Attorney General of Delaware
820 N. French Street
Wilmington, DE 19801

ROBERT A. BUTTERWORTH
Attorney General of Florida
The Capitol PL-01
Tallahassee, FL 32399-1050

THURBERT E. BAKER
Attorney General of Georgia
40 Capitol Square, S.W.
Atlanta, GA 30334-1300

MARGERY S. BRONSTER
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

ALAN G. LANCE
Attorney General of Idaho
P.O. Box 83720
Boise, ID 83720-0010

JEFFREY A. MODISETT
Attorney General of Indiana
219 Statehouse
Indianapolis, IN 46204

THOMAS J. MILLER
Attorney General of Iowa
Hoover Building
Des Moines, IA 50319

CARLA J. STOVALL
Attorney General of Kansas
301 S.W. 10th Avenue
Topeka, KS 66612-1597

THOMAS F. REILLY
Attorney General of Massachusetts
One Ashburton Place
Boston, MA 02108-1698

JENNIFER M. GRANHOLM
Attorney General of Michigan
P.O. Box 30212
Lansing, MI 48909

MIKE MOORE
Attorney General of Mississippi
P.O. Box 220
Jackson, MS

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, NE 68509

FRANKIE SUE DEL PAPA
Attorney General of Nevada
100 N. Carson St.
Carson City, NV 89701-4717

PHILIP T. MCLAUGHLIN
Attorney General of New Hampshire
33 Capitol Street
Concord, NH 03301

PETER VERNIERO
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, CN 080
Trenton, NJ 08625

ELIOT SPITZER
Attorney General of New York
The Capitol
Albany, NY 12224

HEIDI HEITKAMP
Attorney General
of North Dakota
600 E. Boulevard
Bismark, ND 58505-0040

W.A. DREW EDMONSON
Attorney General of Oklahoma
4545 N. Lincoln Blvd., Suite 260
Oklahoma City, OK 73105-3498

HARDY MYERS
Attorney General of Oregon
100 Justice Building
Salem, OR 97310

D. MICHAEL FISHER
Attorney General of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, PA 17120

SHELDON WHITEHOUSE
Attorney General of Rhode Island
150 South Main Street
Providence, RI 02903

CHARLES M. CONDON
Attorney General
of South Carolina
Rembert C. Dennis
Office Building
P.O. Box 11549
Columbia, SC 29211-1549

MARK BARNETT
Attorney General
of South Dakota
500 East Capitol Avenue
Pierre, SD 57501-5070

PAUL G. SUMMERS
Attorney General of Tennessee
425 Fifth Avenue North
Nashville, TN 37243-0405

JOHN CORNYN
Attorney General of Texas
P.O. Box 12548
Austin, TX 78711-2548

JAN GRAHAM
Attorney General of Utah
236 State Capitol
Salt Lake City, UT 84114

WILLIAM H. SORRELL
Attorney General of Vermont
109 State Street
Montpelier, VT 05609-1001

MARK L. EARLEY
Attorney General of Virginia
900 East Main Street
Richmond, VA 23219

DARRELL V. MCGRAW
Attorney General
of West Virginia
State Capitol, Room E-26
Charleston, WV 25305

JAMES E. DOYLE
Attorney General of Wisconsin
114 E. Capitol
Madison, WI 53702

GUY WOODHOUSE
Attorney General of Wyoming
State Capitol
Cheyenne, WY 82002

## QUESTIONS PRESENTED

1. Does Congress lack the power under Article I of the Constitution to abrogate the States' immunity in their own courts from a suit brought by an individual under the Fair Labor Standards Act seeking retroactive monetary relief?

2. If it does, and a State nevertheless exercises its sovereign authority and lifts its immunity as to certain claims in its own courts, can Congress enlarge the State's consent to be sued, and unilaterally prescribe the terms and conditions of its limited immunity waiver, by forcing the State to entertain additional federal claims on the ground that they are of the "same type" as the claims to which the State has consented?

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Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of respondent.

## INTEREST OF *AMICI CURIAE*

The States have an obvious and significant interest in the questions this case presents. Since this Court decided *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the lower federal courts have uniformly held that the Eleventh Amendment bars actions brought under the Fair Labor Standards Act ("FLSA") against the States. In the wake of those decisions, private litigants throughout the country have refiled their FLSA suits in State courts. The outcome of this case will directly affect that litigation.

Moreover, FLSA actions are not the only ones that will be affected by a decision addressing the scope of Congress' authority under Article I of the Constitution to abrogate the States' immunity from suit in their own courts. Congress has exercised its Article I authority in enacting other statutes that, like the FLSA, create a cause of action that can be brought against the States. The decision in this case thus will also have an impact in cases filed under these other statutes. The *Amici* States have a strong interest, therefore, in the questions at issue in this action.

## SUMMARY OF ARGUMENT

This case involves fundamental issues of federalism that affect one of the most basic rights of the *Amici* States: the right not to be sued in their own courts without their consent. That right was a core attribute of State sovereignty when the Constitution was ratified; it was made an explicit part of our national framework when the Eleventh Amendment was adopted; and it is as much an essential component of State sovereignty today as it was when this nation was formed over two hundred years ago. In holding that Congress lacks the authority under its Article I Commerce Clause powers to usurp what is and always has been an inviolable element of State independence and



integrity, the Supreme Judicial Court of Maine properly recognized these postulates and reached a decision that carefully preserves the historic balance of power that underlies and welds the relationship between the federal government and the States.

The Supremacy Clause does not defeat the States' right to maintain an immunity defense in an action brought in their own courts under the FLSA. That Act was passed pursuant to Congress' authority under Article I of the Constitution, which vests the federal legislature with no power to override unilaterally a State's claim of immunity in its own courts. The States are the exclusive source for abrogating their immunity, and few decisions are more sovereign in character than a State's exercise of its consent to be sued. Even when a State has chosen to lift its veil of immunity, the Supremacy Clause does not empower Congress to supplement that fundamental decision by enlarging the types of claims that the States have decided may be filed against them by private parties in State court.

Petitioners and the United States misplace their reliance, therefore, on this Court's tax refund claims for the contrary proposition. Although these cases allow a State court action seeking the recovery of unlawfully exacted taxes, that avenue of relief is not based on the Supremacy Clause but rather the decision of the States to establish procedures enabling taxpayers to pursue such a challenge. While the States have the authority to provide their consent to such suits, Congress does not have the power to do so unilaterally on the States' behalf under Article I or the Supremacy Clause. The decision below should accordingly be affirmed.

## ARGUMENT

### SOVEREIGN IMMUNITY BARS AN ACTION BROUGHT UNDER THE FAIR LABOR STANDARDS ACT AGAINST THE STATES IN STATE COURT

#### A. Congress Lacks The Power Under Article I Of The Constitution To Authorize Such Suits.

##### 1. No authority exists to abrogate the States' Eleventh Amendment immunity in FLSA actions.

While petitioners assert that they have the right to file this action under the FLSA against the State of Maine in the courts of that State, it is undisputed that, due to the Eleventh Amendment, they are prohibited from bringing the same federal claims against the same defendant in federal court. In the federal court version of this litigation, the court of appeals in *Mills v. Maine*, 118 F.3d 37 (1st Cir.1997), concluded that, despite clear evidence of congressional intent to abrogate State sovereign immunity, "*Seminole Tribe* now precludes Congress from using its Commerce Clause powers or any of its other Article I powers to grant jurisdiction to federal courts in suits involving states that do not consent to be sued." *Id.* at 43. The court of appeals also held, as have other federal appellate courts that have addressed the issue, that "the 1974 amendments to the FLSA in dispute . . . here did not apply the Act's wage and hour provisions to the states and state employees as a legitimate exercise of congressional authority to adopt legislation under section five of the Fourteenth Amendment." 118 F.3d at 48. *Accord Abril v. Virginia*, 145 F.3d 182, 186-89 (4th Cir.1998); *Raper v. Iowa*, 115 F.3d 623, 624 (8th Cir.1997); *Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir.1997); *Wilson-Jones v. Caviness*, 99 F.3d 203, 206-11 (6th Cir.1997), *modified on other grounds*, 107 F.3d 358 (1998).



Thus, the court of appeals held that the Eleventh Amendment bars this suit in federal court not because Congress failed to express an intent to abrogate the States' Eleventh Amendment immunity under the FLSA, but rather because it lacks the constitutional authority to do so. In light of that decision, which petitioners did not ask this Court to review, this case presents no question concerning petitioners' ability to pursue their claims in federal court. Petitioners cannot sidestep the prohibitive sweep of Eleventh Amendment immunity merely by removing the locus of the action to State court.

##### 2. The States did not surrender their immunity from suits brought in their own courts when they ratified the Constitution.

"The doctrine of sovereign immunity is an amalgam of two quite different concepts, one applicable to suits in the sovereign's own courts and the other to suits in the courts of another sovereign." *Nevada v. Hall*, 440 U.S. 410, 414 (1979). Sovereign immunity bars a suit brought under the FLSA against the States in their own courts, but not because of the Eleventh Amendment, which involves the second of these two concepts and by its express terms confines "the Judicial power of the United States." *See also Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980). Rather, it does so because it is a core element of the States' sovereignty that they did not relinquish when they "established a more perfect union" by ratifying the Constitution. *Layne County v. Oregon*, 7 Wall. 71, 76 (1869).

As this Court has stated, "[f]or over a century, we have grounded our decisions in the oft-repeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." *Seminole Tribe of Florida v. Florida*, 517 U.S. at 67. That understanding "is rooted in a recognition that the States, although a union, maintain

certain attributes of sovereignty, including sovereign immunity." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). The States' immunity from suit in their own courts is perhaps the most fundamentally important aspect of their sovereignty. It is thus irrelevant, for the purpose of resolving the central issue this case presents, that the Eleventh Amendment "does not apply in state courts," *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63-64 (1989), as "[t]he Eleventh Amendment spells out one instance, but not the only one, in which respect and forbearance is due from the national to the state governments, a respect that cements our federation in the Constitution." *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 210 (1991) (O'Connor, J., dissenting).

These federalism concerns that relate to the States' immunity, and that the Constitution strives to balance, are not limited solely to, or triggered only by, suits brought against the States in federal court. On the contrary, as this Court long ago recognized, "neither a State nor the United States can be sued as defendant in any court in this country without their consent. . . ." *Cunningham v. Macon & Brunswick Railway Co.*, 109 U.S. 446, 451 (1883). *See also Briscoe v. Bank of Kentucky*, 36 U.S. (11 Pet.) 257, 321 (1837); *Beers v. Arkansas*, 61 U.S. (20 How.) 527, 529 (1857); *Hans v. Louisiana*, 134 U.S. 1, 16 (1890). Dismissing the significance of these cases on the ground that they "were directed to the question whether a State could be sued without its consent in federal court, and did not resolve the question whether a State could be sued in another forum," U.S. Br. at 36, the United States asserts that "[a] private right of action in state court does not raise the same federalism concerns that arise when one sovereign is made to appear in the courts of another." *Id.* at 43. This



statement reflects a critical misunderstanding of the balance of power upon which the federal government's relationship with the States is based.

The ability to maintain that "fundamental constitutional balance between the Federal Government and the States," *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985), is equally jeopardized whether Congress authorizes individuals to sue the States in federal court, or passes legislation that seeks unilaterally to abrogate the "'established principle of jurisprudence' that the sovereign cannot be sued in its own courts without its consent." *Will v. Michigan Dept. of State Police*, 491 U.S. at 67 (quoting *Beers v. Arkansas*, 61 U.S. (20 How.) at 529). At a minimum, the attribute of State sovereignty at issue in this case is at least as important as that which was at stake when petitioners originally brought suit against Maine in federal court. Arguably, it is more substantial, as "[t]he immunity of a truly independent sovereign from suit in its own courts has been enjoyed as a matter of absolute right for centuries." *Nevada v. Hall*, 440 U.S. at 414.

Indeed, as Justice Iredell stated more than two hundred years ago, "there is no doubt that neither in the State now in question, nor in any other in the Union, any particular legislative mode, authorizing a compulsory suit for the recovery of money against a State, was in being . . . when the Constitution was adopted. . . ." *Chisolm v. Georgia*, 2 Dall. 419, 434-35 (1793) (dissenting). Simply put, as the United States concedes, "[b]efore the Constitution was adopted, there was an established common-law principle that a State could not be sued in its own courts without its consent." U.S. Br. at 29. At the time the States debated the ratification of the Constitution, therefore, "[t]he suability of a state, without its consent, was a thing unknown to the law." *Hans v. Louisiana*, 134 U.S. at 16. Subject to one

exception that does not apply here, *see Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that remains true today, as "it is not in the power of individuals to bring any State into court – the State's or that of the United States – except with its consent." *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 59 (1944) (Frankfurter, J., dissenting).

The States did not intend to renounce this significant feature of their sovereignty when they ratified the Constitution. On the contrary, quoting from a leading Supreme Court historian, this Court in *Edelman v. Jordan*, 415 U.S. 651, 660 (1974), observed that "[t]he right of the Federal Judiciary to summon a State as defendant and to adjudicate its rights and liabilities had been the subject of deep apprehension and of active debate at the time of the adoption of the Constitution; but the existence of any such right had been disclaimed by many of the most eminent advocates of the new Federal Government, and it was largely owing to their successful dissipation of the fear of the existence of such Federal power that the Constitution was finally adopted." (Quoting 1 C. Warren, THE SUPREME COURT IN UNITED STATES HISTORY 91 (Rev. ed. 1973).) While that debate specifically addressed the proposed Article III clause defining the scope of federal judicial power, and thus "concerned questions of federal-court jurisdiction and the extent to which the States, by ratifying the Constitution and creating federal courts, had authorized suits against themselves in those courts," *Nevada v. Hall*, 440 U.S. at 420-21, the debate's underlying theme involved the more general question whether the Constitution altered the sovereign right of the States not to be sued at all without their consent.

The spirit of the anti-Federalists' views on this subject was well captured in a letter published in the February 21, 1788 edition of the New York Journal from New York



delegate Robert Yates (under the pseudonym "Brutus"), who decried the proposed Article III provision as "improper" "because it subjects a state to answer in a court of law, to the suit of an individual. This is humiliating and degrading to a government, and, what I believe, the supreme authority of no state ever submitted." Brutus XIII, *reprinted in* B. Bailyn, THE DEBATE ON THE CONSTITUTION, FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, Part Two, at 223 (1993). Asserting that "[t]he States are now subject to no such actions," Brutus stated that "[a]ll contracts entered into by individuals with states, were made upon the faith and credit of the states, and the individuals never had in contemplation any compulsory mode of obliging the government to fulfil its engagements." *Id.* The author predicted that the execution of judicial power under the proposed clause would "produce the utmost confusion, and in its progress, will crush the states beneath its weight." *Id.* at 226.

The Federalists' response resounded with a central theme: that the Constitution did not affect the States' right not to be sued in *any* court without their consent. Addressing a similar objection made by George Mason at the Virginia convention, James Madison in June of 1788 stated that "[i]t is not in the power of individuals to call any state into court." J. Elliot, 3 THE DEBATES IN THE SEVERAL CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533 (1888 ed.) ("Elliot's Debates"). After Patrick Henry disputed Madison's assertions, stating that they would "pervert the most clear expressions" of Article III of the proposed Constitution, *id.* at 543, John Marshall took the floor, first expressing the "hope that no gentleman will think that a state will be called at the bar of the federal court," and then asking "[i]s there no such case at present?" *Id.* at 555. Emphasizing that "[i]t is not rational to suppose

that the sovereign power should be dragged before a court," *id.*, Marshall maintained that "[t]he intent is, to enable states to recover claims of individuals residing in other states," *id.*, and that "I see a difficulty in making a state defendant, which does not prevent its being plaintiff." *Id.* at 556.

During the same time frame in which the Virginia debates took place, Alexander Hamilton published a paper in New York, under the pen name "Publius," stressing that ratification of the Constitution would not divest the States of their immunity:

> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every state in the union. Unless, therefore, there is surrender of this immunity in the plan of the convention, it will remain with the states, and the danger intimated must be merely ideal. . . . [T]here is no color to pretend that the state governments, would by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.

The Federalist No. 81, at 487-88 (C. Rossiter ed. 1961) (emphasis in original).

In light of these passages, the United States misstates the central question in this case in terms of whether the Constitution operates to "confer or codify a rule of state sovereignty that restricts the power of Congress to create a federal cause of action that is enforceable against a State in state court." U.S. Br. at 29. The question is not whether the States can prove that the Constitution incorporates the



doctrine of sovereign immunity, but rather whether those challenging that immunity can provide clear and unequivocal proof that the States agreed to relinquish their pre-existing right not be sued in their own courts when they ratified the Constitution. The statements of the leading Framers quoted above strongly support the conclusion that the States did not do so, and certainly contain nothing that approaches clear and unambiguous proof that they did.

**3. The States' adoption of the Eleventh Amendment confirmed their understanding that they could not be sued without their consent.**

Although these Federalist assurances were subsequently disregarded in *Chisolm v. Georgia* in favor of a literalistic reading of Article III, the decision was met with universal disapproval, with the result that the Eleventh Amendment was quickly ratified thereafter so that it "established in effective operation the principle asserted by Madison, Hamilton and Marshall in expounding the Constitution and advocating its ratification." *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934). In establishing "[a] state's freedom from litigation . . . as a constitutional right," *Great Northern Life Ins. Co. v. Read*, 322 U.S. at 51, the Eleventh Amendment confirms the impropriety in subjecting a State to suit before its own judiciary when it cannot be sued in federal court.

It makes little sense to acknowledge that the views of the leading Federalists "were clearly right, as the people of the United States in their sovereign capacity subsequently decided," *Hans v. Louisiana*, 134 U.S. at 14, by ratifying the Eleventh Amendment in the wake of *Chisolm v. Georgia*, and yet at the same time to cast those views aside when the States are sued in their own rather than the federal sovereign's courts. It would be a strange and hollow protection promised the States if it is beyond the power of

the Constitution to override their immunity in federal court, because that would result "in destruction of a pre-existing right of the State governments," The Federalist No. 81 (Hamilton), at 488 (C. Rossiter), but that the abrogation of a functionally identical immunity in the States' own courts would not "involve such a consequence," *id.*, and thus would be constitutionally proper. There is no merit, therefore, in the effort of the United States and petitioners to sidestep the compelling history surrounding the ratification of the Constitution and the Eleventh Amendment on the ground that these dealt only with the "judicial power of the United States." U.S. Br. at 28. *See also id.* at 29-36; Pet. Br. at 22-29.

Nor is their reliance on *Nevada v. Hall* persuasive, as that case did not involve a federal claim at all and thus did not present issues remotely similar to the one here, *i.e.*, whether Congress has the authority under Article I to compel State courts to disregard the bar of sovereign immunity and entertain a federal cause of action against the States. Rather, that case arose in the context of a tort claim that California residents brought in the courts of their own State, which waived immunity from such a claim, against the State of Nevada, which did not, and presented the altogether different question "whether the Constitution places any *limit* on the exercise of one State's power to authorize its courts to assert jurisdiction over another State." 440 U.S. at 421 (emphasis added). This Court found that there existed no such constitutional restriction "on the powers of California exercised in this case," *id.*, emphasizing that if it were to hold otherwise and thus find "that California is not free in this case to enforce its policy of full compensation, that holding would constitute the real intrusion on the sovereignty of the States – and the power of the people – in our Union." *Id.* at 426-27.



Rather than support the position that petitioners and the United States advocate, *Nevada v. Hall* confirms that their view, if adopted, would impose an equally substantial and "real intrusion" on State sovereignty. Indeed, instead of suggesting that a State court can be compelled to entertain a claim against its host State despite that State's assertion of sovereign immunity, this Court expressly asserted otherwise, stating that "no sovereign may be sued in its own courts without its consent," 440 U.S. at 416, and that "[o]nly the sovereign's own consent could qualify the absolute character of that immunity." *Id.* at 414. Thus, regardless of whether, as the United States argues, "the constitutional principle of sovereign immunity" does not bar "suits against a State in another forum," U.S. Br. at 30, this Court's decision in *Nevada v. Hall* makes clear that such suits would be barred when brought by individuals against the States in their own courts without their consent.

**4. Congress has no power to abrogate the States' immunity under the FLSA because that law was not enacted pursuant to section 5 of the Fourteenth Amendment.**

The States' ratification of the Civil War Amendments represents the only exception to this "fundamental rule of jurisprudence." *Ex parte New York, No. 1*, 256 U.S. 490, 497 (1921). Stating that the prohibitions of the Fourteenth Amendment are "restrictions of state power" because they "are directed to the States," this Court held in *Ex parte Virginia*, 100 U.S. 339, 346 (1880), that the enforcement of these laws "is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact." *Id.* Thus, as this Court observed almost 100 years later, appropriate legislation passed under the Fourteenth Amendment does not violate the States' sovereign

immunity because such legislation is "grounded on the expansion of Congress' powers – with the corresponding diminution of state sovereignty – found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments, a phenomenon aptly described as a 'carv[ing] out' in *Ex parte State of Virginia, supra,* 100 U.S., at 346." *Fitzpatrick v. Bitzer*, 427 U.S. at 455-56.

This historical development concerning the States' immunity demonstrates that the federal power to abrogate that immunity has its source of authority in the States, and that the States have retained what they have not given away. Viewed against this backdrop, the FLSA does not constitute a legitimate abrogation of the States' sovereign immunity in actions brought in their courts because, unlike the laws at issue in the cases in which such an abrogation has been found, the FLSA does not rest on any "power of Congress which has been enlarged." *Ex parte Virginia*, 100 U.S. at 345. Petitioners make no claim that the FLSA is Fourteenth Amendment legislation, nor did they even cite that constitutional provision in their petition for certiorari or their merits brief. Rather, petitioners rely solely on Congress' Article I powers in asserting that this suit may be brought against the State of Maine in its own courts without its consent. Article I does not abrogate the States' immunity because the States did not surrender that immunity when they ratified the Constitution.

Rather, as this Court held in *Seminole Tribe*, even when Article I "vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States." 517 U.S. at 72. The sovereign immunity principles embodied in this constitutional limitation on federal judicial power apply



with equal force in cases brought by individuals against the States in State courts. Thus, regardless of whether the substantive requirements of the FLSA apply generally to the States, *see Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the FLSA does not provide sufficient authority for overriding the States' immunity from suits brought in their own courts because the States did not vest Congress with such a power.

For these reasons, Article I does not give Congress the authority to abrogate the States' immunity in their own courts from suits brought by individuals under the FLSA.

**B. Congress Has No Power Under The Supremacy Clause To Pass A Law Pursuant To Article I Of The Constitution That Abrogates The States' Sovereign Immunity In Their Own Courts.**

**1. The Supremacy Clause does not make "supreme" laws that are beyond Congress' authority to enact.**

Because no such congressional authority exists, petitioners and the United States are wrong in arguing that the Supremacy Clause requires State courts to entertain FLSA actions brought against the States. Contrary to the United States' assertion that the State courts are bound whenever "Congress has acted pursuant to one of its enumerated powers," U.S. Br. at 30, as this Court asserted in *Printz v. United States*, 117 S.Ct. 2365 (1997), "[t]he Supremacy Clause . . . makes 'Law of the Land' only 'Laws of the United States which shall be made in Pursuance [of the Constitution]'; so the Supremacy Clause merely brings us back to the question discussed earlier, whether [such] laws . . . violate state sovereignty and are thus not in accord with the Constitution." *Id.* at 2379 (first brackets in original, second added). The Supremacy Clause does not

override the obligation of State courts to respect a State's immunity defense in an FLSA action when Congress lacks the initial authority to abrogate that immunity.

On the contrary, the Supremacy Clause provides only that, "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). *See also City of Boerne v. Flores*, 117 S.Ct. 2157, 2172 (1997) ("Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution."). Rejecting the argument that the States would be bound under the Supremacy Clause by any law that Congress saw fit to pass, Alexander Hamilton wrote that "[i]f individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. . . . But it will not follow from this doctrine that acts of the larger society which are *not pursuant* to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land." The Federalist No. 33, at 204 (Rossiter) (emphasis in original). Rather, "[t]hese will be merely acts of usurpation, and will deserve to be treated as such." *Id.*

While the debates on the adoption of the Constitution did not directly address, in the context of the Supremacy Clause, the authority of Congress to override the States' immunity from suit in their own courts, the debates made clear that no constitutional authority existed to intrude upon similarly fundamental aspects of State sovereignty except to the extent expressly delegated to the federal government. At the Virginia convention John Marshall refuted George Mason's contention that, under the constitutional provision vesting the federal courts with jurisdiction "in all cases



arising under the Constitution and the laws of the United States, . . . the laws of the United States being paramount to the laws of the particular states, there is no case but what this will extend to." 3 Elliot's Debates at 553. Marshall asserted that Congress would not have such constitutional power (*id.*):

> Has the government of the United States power to make laws on every subject? Does he understand it so? Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void.

James Iredell at the North Carolina convention advocated the same views in responding to the charge that, under the proposed Supremacy Clause, Congress would have the power to "produce an abolition of the state governments." 4 Elliot's Debates at 179. Iredell agreed that "when the Congress passes a law consistent with the Constitution, it is to be binding on the people." *Id.* He stated emphatically, however, that "[i]f Congress, under pretence of executing one power, should, in fact, usurp another, they will violate the Constitution." *Id.*[1]

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[1] Embracing the idea that the federal government lacked authority to alter traditional attributes of State sovereignty, Hamilton similarly stated that if "by some forced constructions of its authority (which, indeed, cannot easily

(continued...)

These passages constitute strong evidence that the Framers did not intend to vest Congress with the power to pass laws abrogating the States' right not to be sued in their own courts without their consent. That right is at least as fundamental as the States' right to pass laws governing property and contracts unhindered by the federal government. Indeed, while no constitutional provision expressly bars the federal government from making such laws, the limitation on the federal government's authority to force the States into federal court is affirmatively set forth in the Eleventh Amendment. Thus, "the principle of state sovereign immunity stands distinct from other principles of the common law in that only the former prompted a specific constitutional amendment." *Seminole Tribe*, 517 U.S. at 69. That bedrock constitutional principle of immunity does not assume a subordinated status when Congress seeks to expand the judicial power of the State courts rather than that of the federal judiciary. Sovereign immunity bars the federal legislature's expansion of any court's power to make an unwilling State a party before it.

Under this Court's decisions, "the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 105 (1984).

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(...continued)
be imagined), the federal legislature should attempt to vary the law of descent in any State, would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon that of the State?" The Federalist No. 33, at 204 (Rossiter). *See also id.* at 205 (asserting that a federal law "abrogating or preventing the collection of a tax laid by the authority of a State (unless upon imports and exports) would not be the supreme law of the land, but usurpation of power not granted by the Constitution").



Congress' authority under the Supremacy Clause is not unlimited but rather is constrained by its lack of authority in Article I to abrogate the States' immunity. Given the absence of any such congressional power, this is not a case in which the States have asserted a right "to deny enforcement to claims growing out of a valid federal law," *Testa v. Katt*, 330 U.S. 386, 394 (1947), nor is this a proceeding in which the State courts have sought "to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." *Howlett v. Rose*, 496 U.S. 356, 371 (1990). The States do not deny the command of federal law, or its substantive application so as to require them to pay the overtime mandated by the FLSA. The States merely disagree that the federal government has unlimited authority to dictate how and where private individuals may seek to recover retroactive compensation for alleged violations of these obligations. The principles announced in *Testa* and *Howlett* are not violated by upholding the States' right to assert sovereign immunity in an FLSA action brought in State court, as Congress' attempt to abrogate the States' immunity is not "valid" and does not represent a "superior" law that the State courts are obligated to enforce.

The States take no issue, of course, with the well-settled rule in *Testa* and other cases that they "may not discriminate against rights arising under federal laws." *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 234 (1934). This case does not involve these issues, however, as the decision below simply ensures that neither a federal nor a State court may entertain an FLSA action against unconsenting States. The United States and petitioners thus misplace their reliance on these decisions and other cases – such as *Felder v. Casey*, 487 U.S. 131 (1988), in which the Court held that State courts must entertain suits brought against

municipalities and their officials under 42 U.S.C. § 1983 – because none of these cases involved the questions of State sovereign immunity at issue here. *See also Howlett v. Rose*, 496 U.S. at 365-66 ("Florida has extended absolute immunity from suit not only to the State and its arms but also to municipalities, counties, and school districts that might otherwise be subject to suit under § 1983 in federal court."). A State does not engage in discrimination within the meaning of these decisions when it insists that it be accorded the same immunity in its own courts that it receives in federal court.

This Court in *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. at 206, agreed generally that "making a State's liability or immunity, as the case may be, the same in both federal and state courts, has much to commend it." Nevertheless, citing "the doctrine of stare decisis" and "a longstanding statutory construction implicating important reliance interests," *id.* at 206-07, this Court refused to overrule a 28-year-old interpretation that Congress intended to subject the States to suit under the Federal Employers' Liability Act ("FELA"), and held that an action brought under that Act that was barred by the Eleventh Amendment could be brought against the States in State court. *Hilton* does not stand for the broad proposition, however, that the Supremacy Clause requires State courts to entertain federal causes of actions that cannot be brought in federal court due to a lack of congressional power.

The issue in *Hilton* concerned "a pure question of statutory construction," 502 U.S. at 205, involving Congress' intent to create a cause of action against the States, which is far different from the issue here whether Congress has the authority to abrogate the States' immunity in their own courts. In addressing the former question only, *Hilton* held merely that a federal cause of action, which is



barred by the Eleventh Amendment because of an absence of clear congressional intent to abrogate, can still be brought in State court. In reaching this conclusion, this Court assumed that Congress had the authority to abrogate immunity in FELA actions, as a plurality of the Court just two years before in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), held that the Commerce Clause grants Congress that power. That assumption is no longer valid in light of *Seminole Tribe*. Neither *Hilton* nor any other case holds that a State can "be forced to entertain in its own courts suits from which it was immune in federal court," *Howlett v. Rose*, 496 U.S. at 365, when that immunity is based on a complete lack of congressional authority.

In these circumstances, the States, not Article I of the Constitution, are the sole source of authority for abolishing their immunity in their own courts. While a State's waiver as to a State-law cause of action is equally a waiver as to an analogous federal-law claim, *see Testa v. Katt*, 330 U.S. at 392, the "substantive policy judgment," U.S. Br. at 24, of whether a State chooses to waive immunity is for each State to make, not Congress, because it is up to each State, not Congress, to "prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted. . . ." *Beers v. Arkansas*, 61 U.S. (20 How.) at 529.

The United States is wrong, therefore, that "[a] State's interest in determining when it will be subject to suit in its own courts for a violation of federal law loses all force when, as here, its courts entertain state-law claims of the same general type." U.S. Br. at 43 n.7. A State's consent to be sued is, perhaps more than any other choice it may make, "a decision of the most fundamental sort for a sovereign entity." *Gregory v. Ashcroft*, 501 U.S. at 460. The Supremacy Clause does not provide Congress with the

authority to augment such a core exercise of State sovereignty. On the contrary, Congress has no power "to enlarge or regulate the jurisdiction of state courts or to control or affect their modes of procedure," *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 56 (1912), by adding to the category of claims that only the States can decide will be brought against them. *See also Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 39 (1994) ("The Eleventh Amendment largely shields States from suit in federal court without their consent, leaving parties with claims against a State to present them, *if the State permits*, in the State's own tribunals.") (emphasis added).

The States can thus refuse to waive their immunity from a class of claims that are brought in their own courts when Congress has no authority to abrogate that immunity, just as they can effect a limited waiver of immunity by imposing conditions on the pursuit of such claims in State court. Since a State may choose not to waive its immunity at all in its courts, it can certainly decide to subject that immunity waiver with respect to FLSA claims to the same conditions that apply to all other claims brought against the State. Neither of these choices would violate the Supremacy Clause and "discriminate in a manner detrimental to the federal right," *Felder v. Casey*, 487 U.S. at 146, because that "right" is subject to the States' exercise of their prerogative to decide whether and how to lift the shield of immunity in their own courts.

**2. This Court's tax refund cases do not hold that the Supremacy Clause overrides the States' immunity from suit in their own courts.**

In claiming otherwise, the United States (U.S. Br. at 34) and petitioners (Pet. Br. at 29-32) misplace their reliance on this Court's decisions in *Reich v. Collins*, 513 U.S. 106 (1994), and *McKesson Corp. v. Division of Alcoholic*



*Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18 (1990). While these cases allow a State court action challenging the collection of a purportedly unlawful tax, this is not because of the Supremacy Clause. Rather, it is the result of each State's choice in these cases to waive its immunity by providing a process in which taxpayers may challenge the validity of taxes that the State has imposed.

As this Court has observed, "'a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment. . . .'" *Reich v. Collins*, 513 U.S. at 109 (quoting *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930)). "In such cases the immunity of the sovereign does not extend to wrongful individual action and the citizen is allowed a remedy against the wrongdoer personally." *Great Northern Life Ins. Co. v. Read*, 322 U.S. at 51. This is so whether suit is brought in State or federal court. *See Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, 462 (1945) ("Where relief is sought under the general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally.") (citing *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280 (1912)). Rather than subject their officials to this type of liability exposure, many States have established a "procedure in lieu of the common law right to claim reimbursement from the collector," *Great Northern Life Ins. Co. v. Read*, 322 U.S. at 53, and by doing so have provided an opportunity for "taxpayers to raise their objections to the tax in a postdeprivation refund action." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. at 38-39.

Such a procedure amounts to a waiver of the State's

immunity in its own courts, but not necessarily in federal court. For example, as this Court stated in *Great Northern Life Ins. Co. v. Read*, 322 U.S. at 54, "[w]hen a state authorizes suit against itself to do justice to taxpayers who deem themselves injured by any exaction, it is not consonant with our dual system for the Federal courts to be astute to read the consent to embrace Federal as well as state courts." Rather, "when we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found." *Id.*

These tax cases thus do not stand for the proposition that the Supremacy Clause is the reason that a tax refund action which cannot be brought in federal court may nevertheless be pursued in State court. In an attempt to prove otherwise, petitioners and the United States latch on to a passage from *Reich v. Collins* in which this Court first asserted that such a State court action is proper, "the sovereign immunity States traditionally enjoy in their own courts notwithstanding," 513 U.S. at 110, and then cited *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, as an example where "the sovereign immunity States enjoy in federal court, under the Eleventh Amendment, does generally bar tax refund claims from being brought in that forum." *Reich*, 513 U.S. at 110. Neither *Reich* nor *Ford Motor Co.* holds, however, much less even suggests that it is due to the Supremacy Clause that such a refund claim can be brought in State court. Rather, the claim in *Reich* was brought in State court pursuant to a Georgia tax refund statute. *See id.* at 109, 111. This Court's Eleventh Amendment holding in *Ford Motor Co.* was similarly based solely on its finding that the Indiana refund statute "which vests original jurisdiction of suits for refund in the 'circuit or superior court of the county in which the taxpayer resides



or is located' indicates that the state legislature contemplated suit in the state courts." *Ford Motor Co.*, 323 U.S. at 466.

The statutes at issue in *Reich*, *Ford Motor Co.*, and *Great Northern Life Ins. Co.* are typical of those by which States afford taxpayers a postdeprivation opportunity in which to challenge a tax claimed to be unconstitutional or otherwise unlawful. *See also, e.g., Smith v. Reeves*, 178 U.S. 436, 441 (1900) ("It is quite true the state has consented that its treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the state board of equalization. But we think that it has not consented to be sued except in one of its own courts."); *Chandler v. Dix*, 194 U.S. 590, 591 (1904). Those statutes (and the States' consent to be sued that they set forth) are the reason, not the Supremacy Clause, that such actions may be brought in State rather than federal court. *Cf. Seminole Tribe*, 517 U.S. at 71 ("[T]his Court is empowered to review a question of federal law arising from a state court decision *where a State has consented to suit*.") (emphasis added) (citing *Cohens v. Virginia*, 6 Wheat. 264 (1821)). While the States have authority to consent to such suits, Congress has no similar power under either Article I or the Supremacy Clause to do so on the States' behalf.

**3. It is consistent with the Supremacy Clause to sustain the defense of State sovereign immunity against an individual's FLSA claim that seeks retroactive relief only.**

The nature of the relief that petitioners seek confirms the propriety in upholding Maine's defense of sovereign immunity against their claim that federal law has been violated. "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest

in assuring the supremacy of that law." *Green v. Mansour*, 474 U.S. 64, 68 (1986). This Court has thus long recognized that the Eleventh Amendment does not prevent a federal court plaintiff from obtaining injunctive relief on the basis of a State official's continuing wrongful actions. *See Ex parte Young*, 209 U.S. 123 (1908). This case involves no ongoing violation of federal law, however, as the only relief that petitioners seek is retroactive back pay for overtime they worked but were not compensated. (Pet. App. 14a, 16a.) While "prospective and retrospective relief implicate Eleventh Amendment concerns," only "the availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause." *Green v. Mansour*, 474 U.S. at 68.

Affirming the decision below in no way runs afoul of the Supremacy Clause because, as the United States acknowledges, "[u]nder the FLSA, . . . the Secretary of Labor may seek prospective relief." U.S. Br. at 38. Although the United States complains that employees "may not seek prospective relief," *id.*, and that the Secretary's "enforcement capability" is limited, *id.* at 37 (quotations omitted), these are reasons for amending the FLSA and providing more funding to the Department of Labor. They do not justify a determination, however, that an action brought against a State that seeks relief solely on the basis of past wrongs gives rise to any paramount interest in upholding the supremacy of federal law. Just as "compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment," *Green v. Mansour*, 474 U.S. at 68, the plaintiffs' request for back pay does not implicate such compelling federal interests as to override Maine's sovereign right not to be sued in its own courts.



The court below thus committed no error in rejecting petitioners' claim that the courts of Maine were obligated to enforce this FLSA action against the State.

## CONCLUSION

For the reasons stated, the judgment of the Supreme Judicial Court of Maine should be affirmed.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
MICHELE J. MCDONALD
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-6318

Counsel for *Amici* States

**Counsel of Record*

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